ARIZONA DEPARTMENT OF ADMINISTRATION - ASET

Arizona FirstNet

Response to: NTIA / FirstNet Responder Network Authority Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012

4/28/2015

The responses in this document are a compendium of comments of public safety and public service Stakeholders in the State of Arizona representing a diverse blend of disciplines and geographies. The responses may be paraphrased to more clearly reflect the intent of the Stakeholder comment.

They do not represent a legal opinion or official policy position of the State.

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Second Notice

A. Technical Requirements Relating to Equipment for Use on the NPSBN

In the First Notice, we explored the network elements that comprise the NPSBN. We address below a separate section of the Act concerning equipment for use on the network. Our overarching considerations in these interpretations are the Act's goals regarding the interoperability of the network across all geographies and the cost-effectiveness of devices for public safety.

Section 6206(b)(2)(B) requires FirstNet to "promote competition in the equipment market, including devices for public safety communications, by requiring that equipment for use on the network be: (a) Built to open, non-proprietary, commercially available standards; (b) capable of being used by any public safety entity and by multiple vendors across all public safety broadband networks operating in the 700 MHz band; and (c) backward-compatible with existing commercial networks to the extent that such capabilities are necessary and technically and economically reasonable." [5] Several critical terms in this provision must be interpreted to allow FirstNet to develop requests for proposals and network policies that will fulfill these requirements.

First, we must determine the scope of the "equipment" that must satisfy the requirements of Section 6206(b)(2)(B). The Act states that this Section applies only to equipment "for use on" the NPSBN, rather than, for example, "equipment of" or "equipment constituting" the network. Further, the Act makes clear that the range of equipment implicated in the Section must at least include "devices," which, in the telecommunications market, is often a reference to end user devices, rather than equipment used inside the network to provide service to such devices. Finally, whatever the scope of the term "equipment," such equipment must be "built to open, non-proprietary, commercially available standards."

In Section 6202, the Act describes the components of the NPSBN itself, including a core network and RAN, and requires each to be based on "commercial standards." [6] Thus, when describing criteria for the equipment with which the network itself is to be constructed, the Act requires use of only equipment built to commercial standards, whereas in describing the equipment of Section 6206(b)(2)(B), the Act requires that such equipment must be built not only to commercial standards, but also "open, non-proprietary" standards. [7] Therefore, given the "for use on" language of the provision, the distinct addition of the terms "open, non-proprietary," and the separate section of the Act describing and prescribing requirements for the components of the network itself, it appears that the equipment described in Section 6206(b)(2)(B) refers to equipment using the services of the network, rather than equipment forming elements of the NPSBN core network or the RAN.

This interpretation is supported by the other two elements appearing in Section 6206(b)(2)(B). For example, Section 6206(b)(2)(B)(ii) requires that such equipment be "capable of being used by any public safety entity," which would seem inconsistent with a requirement applicable to complex network routing and other equipment used inside the network. Similarly, Section 6206(b)(2)(B)(iii) requires such equipment to be "backward-compatible with existing commercial networks" in certain circumstances, which would again make sense in the context of end user devices, but not equipment being used to construct the network. This interpretation is also consistent with section 4.1.5.1, entitled "Device or UE," of the Interoperability Board Report. [8]

Thus, we preliminarily conclude that Section 6206(b)(2)(B) applies to any equipment, including end user devices, used "on" (i.e., to use or access) the network, but does not include any equipment that is used to constitute the network. Given the interoperability goals of the Act and that end user devices will need to operate seamlessly across the network regardless of State decisions to assume RAN responsibilities, we also preliminarily conclude that this provision applies whether or not the equipment is to access or use the NPSBN via a RAN in a State that has chosen to assume responsibility for RAN

deployment. [9] We seek comments on these preliminary conclusions, and on what if any equipment, other than end user devices, would fall under the scope of Section 6206(b)(2)(B) under this conclusion.

- Agreed that this applies to end user devices.
- There are only a few networks that can provide backbone. FirstNet recognized that they may not be able to get a network in place if it is all open standards. Devices have to talk to everything spelled LTE.
- How do you discern LTE from LMR – harder to have LMR device that has an LTE device built into it vs an LTE device with LMR application.
- The device has to meet standards and apps running on the device should not.
- Not sure how you could have a nationwide system if it was not compatible. Have to build it to the same standards as the rest of the states.
- Open, non-proprietor for end user equipment is self-defeating for innovation in some respects. If this were the case almost all current smart phones would be excluded. I think the determination should be end user equipment that meets connectivity and operational standards for the network and not specify or limit the use of all devices that would meet this specification. Marketplace will provide options. The only concern should be; does the device connect in a standard and manageable fashion to the network. The network is a "data pipe" to connect a multitude of end user devices to a multitude of business application of which, someday, could be voice, as well as the Internet. Limiting the end user device options is not using the network to its fullest potential. I can see using the FirstNet network to connect a Public Safety Internet of Things network together, gunshot detection, traffic sensors and control, cameras, security systems, GPS locators, body worn sensors, etc.
- If a state has different or lower thresholds it may degrade network systems – multi-state events – come in with a different threshold – defeats the purpose of the whole nationwide network. Have to make sure the network is built to the same standards across state lines.
- The components of the Network that can be considered to be the 4G LTE portion have to follow 3G-PP standards and be interchangeable across vendors. That would leave only long range backhaul as something that may be interpreted as not requiring "open, non-proprietary, commercially available standards" which may be OK as long as alternative and competitive vendors may be used over time.

Having preliminarily concluded that Section 6206(b)(2)(B) applies to end user devices, we turn to the requirements of this provision. Section 6206(b)(2)(B)(i) requires that all equipment used to access the NPSBN must be built to "open, non-proprietary, commercially available standards." [10] We seek comments on the scope of these requirements, including in particular the extent to which they impose requirements beyond the minimum requirements identified in the Interoperability Board Report, and whether they would preclude, for example, proprietary operating systems on devices. Such an expansive interpretation could eliminate use of commercial Long-Term Evolution ("LTE") devices used by public safety entities today.

The Act, however, defines "commercial standards" as "technical standards . . . for network, device, and Internet Protocol connectivity."[11] We thus preliminarily conclude that the Act's goal of "promot[ing]

competition in the equipment market" would still be served, as it is today in the commercial market, by applying these requirements to only those parameters necessary to maintain interoperability with the NPSBN—that is, "connectivity"—and which are included in the Interoperability Board Report or otherwise in FirstNet network policies. We recognize that, for innovation to bring forth improved products for the NPSBN, and for FirstNet and public safety entities to benefit from competition, product differentiation must be allowed to thrive. However, such differentiation must be balanced with the interoperability goals of the Act. Thus, certain network technical attributes must be met by the equipment under the terms of Section 6206(b)(2)(B), but other equipment attributes may be left to individual vendors to develop. We seek comments on this preliminary conclusion and the appropriate delineation between attributes for "connectivity" and others.

- Critical that underlying interoperability standards/protocols are observed. Want manufacturers to be competitive and innovative to increase quality, competitive pricing - has to be interoperable so everyone can use the FirstNet system.

- Application level shouldn't exist in FirstNet – would be all points outside of FirstNet – shouldn't be FirstNet's responsibility to host apps and specific services. There are a lot of discussions on EMS video support – these should be layers over and above FirstNet mission. They need to be discussed with FirstNet – applications are talked about with what is possible with FirstNet – like voice communications, which is actually an application that is served within a FirstNet system. It is data management – once you add functions and applications – don't get into what is being discussed with equipment compatibility. Focus on management, access rights; accept to/from data repositories. Those are opportunities for vendors – Apple could do FaceTime if that is a service that public safety wants to bring on FirstNet. These are add-ons – not what FirstNet should be focused on. There are some wish list things that people want – not what FirstNet should be about.

Beyond the Act's requirement that equipment for use on the network comply with specific types of standards, Section 6206(b)(2)(B)(ii) requires that the equipment be "capable of being used by any public safety entity and by multiple vendors across all public safety broadband networks operating in the 700 MHz band." First, the requirement that the equipment be capable of being used by any public safety entity would appear to serve the cause of both interoperability and competition in the equipment market by ensuring the largest market possible for such devices. We seek comment on the limits of this requirement, including whether use of the word "capable" permits sufficient flexibility for product differentiation by public safety discipline or application. For example, we preliminarily conclude that this requirement would not preclude devices primarily designed for police applications so long as such devices were technically capable of being used by, for example, emergency medical services.

- The hot spot should be on the FirstNet network, the tablet etc. belongs to the agency, not really part of FirstNet or their decision making.

- Regardless of vendor it should be able to ride on the LTE network.

- Have different channels; create an open competitive market; public safety must have choices.

Next, we examine the requirement that such equipment be "capable of being used . . . by multiple vendors." [12] We seek comments on the distinction between Congress' use of the terms "used . . . by multiple vendors" and, for example, if Congress had used the terms "manufactured by multiple vendors," and whether this distinction should be interpreted as requiring devices that are at least

capable of being sold to public safety entities through multiple suppliers who are not themselves manufacturing the devices. We seek comments on how this requirement should be interpreted to further the interoperability goals of the Act.

- Legislation says has to be used by multiple people, as long as multiple people sell it, doesn't matter who makes it.
- Would also say application hosting as a vendor – contract with someone to host your CAD network – the vendor would be operating on the network.
- Environment this was written – looking to cell phone provider vs LMR – if I have a Sprint phone, I can't get on Verizon network. Want to loosen up the proprietary nature of the hand unit. Like Apple iPhone is sold through Verizon/Sprint – used by everyone….prior was only sold at their stores (made it proprietary). Want to loosen it up – more manufacturers, more that it is not proprietary.
- Can't use just one supplier – similar to LMR, can only use Motorola, trying to loosen it up so everyone can piggy back on the LTE system, no matter the equipment manufacturer?
- FirstNet is leaning toward market dominance by manufacturer – language suggests that distribution channels be considered – multiple channels of manufacturer devices. Should encourage a robust competitive marketplace for devices.
- There is one small issue – could be sold by multiple folks that didn't make it – could be locked into one manufacturer – but lots of other people can sell that one thing. It has to be competitive.

The final phrase of the requirement—"across all public safety broadband networks operating in the 700 MHz band"—could be interpreted to modify just the vendor clause, but we preliminarily conclude that, taken as a whole, it appears that Congress desired both the public safety entity clause and multiple vendor clause to be modified by the phrase. [13]

- The way I read it, "operating in the 700 band" only refers to Band Class 14.
- If I am Verizon and I have 700 MHz spectrum, can I create private public safety wireless network outside of FirstNet? – (This would result in) no say over Verizon.
- Would only be AT&T and Verizon – all rest are on a different band.

We seek comments on this preliminary conclusion. The term 700 MHz band is a defined term under the Act, and includes not just the frequencies licensed to FirstNet, but all frequencies from 698 to 806 megahertz. [14] Thus, we also seek comments on the appropriate definition of, and which "public safety broadband networks" [15] other than FirstNet would qualify under this clause, and note that the Act contains a separate definition for "narrowband spectrum." [16]

- No comment.

Finally, Section 6206(b)(2)(B) requires equipment for use on the network to be "backward-compatible with existing commercial networks to the extent that such capabilities are necessary and technically and economically reasonable." [17] Such backwards compatibility could prove very valuable for roaming and

in the unlikely event that FirstNet's Band 14 network encounters an outage. We seek comments on the scope of the term "backward-compatible," particularly with respect to whether non-LTE networks (including switched-voice networks) are implicated, and the criteria for determining whether such capabilities are necessary and technically and economically reasonable.

- There would not be enough spectrum for the "Network" to be backwards compatible to 3G; but devices should be backwards compatible (for roaming).
- Another way of looking at it; Public safety uses a hybrid mix of LMR and cellular; switched voice networks have to be part of it; should embrace every existing networks (IP, LMR, voice); must consider LMR and should be backwards compatible.
- Backwards compatible is a good thing but must be economically reasonable.

Note: This document has been prepared so that the requests for comment can be more easily identified and reviewed. The official Second Notice and Request for Comment is located on the Federal Register website - (https://federalregister.gov/a/2015-05855).

B. FirstNet Network Policies

i. Overview

Under Section 6206(b), FirstNet must "take all actions necessary to ensure the building, deployment, and operation of the [NPSBN]." [18] In addition to this general charge, subsection (b) of Section 6206 itemizes a long list of specific actions FirstNet must take in fulfilling this obligation.
In the next subsection (c) of Section 6206, however, FirstNet is tasked with establishing "network policies" in carrying out these requirements of subsection (b). [19] In particular, under subsection (c)(1), FirstNet must develop the appropriate timetables, coverage areas, and service levels for the requests for proposals referenced in subsection (b), along with four sets of policies covering technical and operational areas. [20] In paragraph (2) of subsection (c), FirstNet is required to consult with State and local jurisdictions regarding the distribution and expenditure of amounts required to carry out the network policies established in paragraph (1). [21]
We explore these requirements below considering the overall interoperability goals of the Act. These network policies, along with the Interoperability Board Report, will form the fundamental basis of such interoperability for public safety, and thus their scope and applicability must be clear to equipment and device manufacturers, network users, and any States that choose to assume RAN responsibilities in their States.

ii. Network Policies

Under Section 6206(c)(1), entitled "ESTABLISHMENT OF NETWORK POLICIES," FirstNet is required to develop five groups of items, the first being "requests for proposals with appropriate" timetables, coverage areas, service levels, performance criteria, and similar matters. [22] Unlike the remaining four groups of items in paragraph (1), this first group might not ordinarily be thought of as the subject of a "policy" based on a plain language interpretation. The title of the entire paragraph, however, does reference "policies." In addition, the consultation required in paragraph (2) of subsection (c) is with regard to the "policies established in paragraph (1)," and expressly includes topics such as "construction" and "coverage areas" that are the subject of the requests for proposals listed in

paragraph (1)(A). [23] Thus, we preliminarily conclude that the items listed in paragraph (1)(A) are "policies" for purposes of paragraph (2) and as the term is generally used in subsection (c).

- Agree.
- Agree with assessment in Second Public Notice. Consistent operational policy is essential to a dependable and repeatable end user experience across the network, especially on State borders and regionally.

In addition to the appropriate timetables, coverage areas, and other items related to the requests for proposals in paragraph (1)(A), FirstNet must develop policies regarding the technical and operational requirements of the network; practices, procedures, and standards for the management and operation of such network; terms of service for the use of such network, including billing practices; and ongoing compliance reviews and monitoring. [24]

Taken as a whole, these policies, including the elements of the requests for proposals, form the blueprint and operating parameters for the NPSBN. Many of these policies will be informed by the partners chosen to help deploy the network, and will likely change over time, with increasing specificity as FirstNet begins operations. Some of these policies, such as those related to the "technical and operational requirements of the network," will prescribe how the FirstNet core network and RAN will interconnect and operate together, consistent with the Interoperability Board Report. This interaction is among the most important "technical and operational" aspects of the network given the Act's definition of these terms and our preliminary interpretations in the *First Notice.* [25] For example, this interaction would determine how the FirstNet core network implements authentication and priority and preemption at the local level, including the framework for such authentication and prioritization provided to local jurisdictions to enable them to control important aspects of such authentication and prioritization. Other technical, operational, and business parameters essential to the nationwide interoperability of the network will be determined by such policies governing core network and RAN interactions. This raises the question as to whether and how FirstNet's policies developed under subsection (1) apply to States that assume responsibility for deployment of the RAN in such States under Section 6302.

The Act does not expressly state whether only FirstNet, or both FirstNet and a State assuming RAN responsibilities must follow the network policies required under Section 6206(c)(1). [26] Sections 6202 (defining the NPSBN) and 6206 (establishing FirstNet's duties) only refer to the "nationwide public safety broadband network" or the "network", without expressly indicating whether such State RANs are included in the term. We preliminarily conclude below that, given the provisions of the Act, the Interoperability Board Report, and the overall interoperability goals of the Act and the effect on such interoperability of not having the network policies of Section 6206(c)(1) apply to opt-out RANs, such policies must so apply to ensure interoperability.

- FirstNet is overstepping their authority according to the Act.
- Could significantly restrict a State's ability to operate their RAN; we should not support.
- This could be very restrictive; states should figure out for themselves.
- Agree that if it gets into the weeds that it could be restrictive; when I first looked at it…if a state had lower standards (looking at the RFP)…if a state ops out and provides less coverage; should have a broad policies; to what granularity should a policy state?

- The technical and operations policies should be uniform; FirstNet should not have the authority on other areas.

Section 6302(e), addressing the process by which a State may submit a plan to assume RAN deployment, states that the alternative RAN plan must demonstrate "interoperability with the [NPSBN]." [27] This interoperability demonstration is separate from a State's demonstration that it will comply with the minimum technical interoperability requirements of the Interoperability Board Report, and thus must require a demonstration of interoperability in addition thereto. Similarly, Section 6302(e)(3)(D) requires such States to demonstrate "the ability to maintain ongoing interoperability with the [NPSBN]." [28]
A literal reading of these provisions could be interpreted as indicating a distinction between the NPSBN and such State RANs, such that the policies required by Section 6206, which apply to the "nationwide public safety broadband network" or "the network" could theoretically be interpreted as not directly applying to such RANs. We preliminarily conclude, however, that such an interpretation reads too much into the wording of Section 6302, which could also be interpreted as requiring the State RAN to interoperate with "the rest of" the NPSBN.

- FirstNet concludes the state RAN must demonstrate interoperability with the rest of the network.
- Must maintain/sustain ongoing interoperability with the network.
- As long as they don't expand beyond the FCC interoperability requirements.
- Should not fall on opt-out states - this is design on paper, real life, multi-state events, not been proven. Need to be able to test it if people are spending money. Don't want to be burdensome or excessive in costs to prove it. Has to be reciprocal on opt-in and opt-out states.
- The testing of new RANs should be uniform and equally applied to newly built RANs whether they are opt-out or opt-in States.

The Act's primary goal is the creation of an interoperable network based upon a "single, national network architecture that evolves with technological advancements" and is comprised of both a core network and RAN. [29] This suggests that network policies established by FirstNet pursuant to Section 6206(c)(1) should apply to all elements of the network, including RANs built by individual States, to ensure interoperability. In addition, Congress did not differentiate between opt-in and opt-out States in the provisions of Section 6206(c)(2) requiring consultation with States on the policies of Section 6206(c)(1), and such consultations would presumably not be required for States assuming RAN responsibility if the policies in question (at least those applicable to RANs following opt-out) did not apply to their RAN deployment.
In the context of the Act, we thus preliminarily conclude that an important aspect of a State's demonstrations of interoperability under Section 6302(e)(3) would be a commitment to adhering to FirstNet's interoperability policies implemented under Section 6206(c) that are applicable to NPSBN RANs. This could be particularly important because such policies will likely evolve over time as the technology, capabilities, and operations of the network evolve. An alternative reading could result in freezing in time the interoperability of an opt-out State RAN contrary to the goals of the Act. We seek comments on these preliminary conclusions.

- It makes sense to keep up with interoperability.

- In absence of E&O how will stakeholders provide input?
- Will the states and public safety be involved in the process of creating future network policies to be able to have input for ongoing care and feeding of the network?
- There needs to be a change management process.
- We encourage FirstNet to provide draft versions of the policies in question so we would have a better sense of we're actually talking about. As long as the policies are obviously going to benefit the uniformity and capability of the network and not infringe on the ability of public safety with the State to manage their operations, then FirstNet will be a success.

Notwithstanding these conclusions, however, the policies established under Section 6206(c) would, if not directly, likely apply indirectly to a State seeking to assume State RAN responsibilities. As discussed above, such States must demonstrate interoperability with the NPSBN, and from a practical perspective such interoperability will largely depend, as is the case with FirstNet's deployed core networks and RANs, on compliance with the network policies of Section 6206(c)(1).[30] In addition, such States must also demonstrate "comparable security, coverage, and quality of service to that of the [NPSBN]." [31] FirstNet's policies will establish requirements for such security, coverage, and quality of service standards for the NPSBN, and thus States seeking to assume State RAN responsibilities would, practically speaking, need to demonstrate "comparable" capabilities to those specified in these policies. The Federal Communications Commission ("FCC") and NTIA will presumably use these policies in making this comparison at least at the point in time when a State applies to assume RAN responsibilities.
Finally, given that FirstNet has a duty to ensure the deployment and operation of a "nationwide" public safety broadband network, we preliminarily conclude that, independent of the interpretations discussed above, FirstNet could require compliance with network policies essential to the deployment and interoperable operation of the network for public safety in all States as a condition of entering into a spectrum capacity lease under Section 6302(e)(3)(C)(iii)(II). [32] Accordingly, in order to ensure the interoperability goals of the Act and for the reasons discussed above, we preliminarily conclude that FirstNet's network policies will either directly or indirectly apply to any State RAN deployment. We note that FirstNet is subject to extensive consultation requirements with States regarding such policies under Section 6206(c)(2), and thus States will have substantial opportunities to influence such policies and, as is discussed more fully below, FirstNet will want to work cooperatively and over time with States in their establishment. We seek comments on these preliminary conclusions.

- No comment.

C. A State's Opportunity to Assume Responsibility for Radio Access Network Deployment and Operation

i. Overview of Statutory Provisions on Deployment of State Networks

Section 6302(e) describes the process for determining whether FirstNet or a State will conduct the deployment of the RAN within such State.[33] As we preliminarily concluded in the *First Notice,* the Act requires FirstNet to provide the core network in all States. [34] The process for determining who will deploy the RAN in a State requires FirstNet to provide States with (a) notice that FirstNet has completed its request for proposal process for the construction and operation of the nationwide network, (b) details of FirstNet's proposed plan for buildout of the NPSBN in such State, and (c) the funding level, as determined by NTIA, for such State. [35] The Governor of a State, after receiving the notice, must then

choose to either participate in the deployment of the network as proposed by FirstNet, or conduct its own deployment of a RAN in such State. [36] Show citation box

It is important to note that the provisions of the Act, and the interpretations discussed below, address what is essentially the final or official plan presented to a State. FirstNet expects to work cooperatively, and in keeping with its consultation obligations, with each State in developing its plan, including an iterative approach to plans in order to achieve both a State's local and FirstNet's nationwide goals for the NPSBN. Accordingly, none of the discussions in this *Second Notice* should be interpreted as implying a unilateral or opaque approach to plan development prior to the presentation of the official "plan" reflected in the Act.

Following such a FirstNet plan presentation, a decision by the Governor to assume responsibility for deployment of the State's RAN sets in motion an approval process for the State's alternative RAN deployment plan. [37] The FCC must approve the plan. [38] If this alternative RAN plan is approved, the State *may* apply to NTIA for a grant to construct the RAN within the State and *must* apply to NTIA to lease spectrum capacity from FirstNet. [39] Conversely, if a State alternative plan is disapproved, the RAN in that State will proceed in accordance with FirstNet's State plan. [40]

The Act is not entirely clear about the economic and operational effects of an approved alternative State plan. The interpretations discussed below will have substantial effects on the operation, funding, and potentially the viability of the FirstNet program. Congress drew a balance between the interoperability and self-sustainment goals of the Act and preserving the ability of States to make decisions regarding the local implementation of coverage, capacity, and many other parameters if they wanted to exercise such control. FirstNet has a duty to implement the Act in a manner that is faithful to this balance and to the opportunity of States to exercise local deployment control. But in balancing the above interests, Congress was careful not to jeopardize the overall interoperability and self-sustainment goals of the Act in its express provisions. For example, a State's ability to exercise local control of deployment is with respect to the RAN only, not the core network, and the State must demonstrate that its alternative plan for the RAN maintains the overall goals of the Act through, among other things, demonstrating interoperability and cost-effectiveness.

In the discussions below we continue this balancing through our preliminary interpretations of often complex provisions. These interpretations are preliminary, and they attempt to remain faithful to the balance Congress appears to have intended by affording States the right to assume RAN responsibilities, but not at the cost of jeopardizing the interoperability and self-sustainment goals of the Act on which public safety entities and the overall program will depend.

ii. FirstNet Presentation of a State Plan

FirstNet must present its plan for a State to the Governor "[u]pon the completion of the request for proposal process conducted by FirstNet for the construction, operation, maintenance, and improvement of the [NPSBN] . . . ." [41] The Act does not further define when such process is "complete." The process cited is presumably the request for proposal process detailed in subsections 6206(b) and (c), which describe FirstNet's duty to develop and issue "requests for proposals." [42] Because Section 6206 speaks in terms of plural "requests for proposals," the "process" referenced in subsection 6302(e) could be interpreted to require completion of all such requests for proposals, particularly given that Section 6302(e) refers to the request for proposal process for the "nationwide . . . network," rather than just a process for the State in question. This would require the completion of requests for proposals for all States prior to any one State receiving a plan from FirstNet. [43]

We tentatively conclude, however, that it is reasonable to interpret subsection 6302(e) to merely require completion of the process for the State in question, rather than the nation as a whole, prior to presentation of the plan to the State, assuming that FirstNet can at that stage otherwise meet the

requirements for presenting a plan (and its contents) to such State. [44] First, Section 6206 provides FirstNet with flexibility in deciding how many and of what type of requests for proposals to develop and issue. This flexibility inures to the benefit of public safety and the States by allowing FirstNet to reflect the input of regional, State, local, and tribal jurisdictions under the required consultations of Section 6206. If Section 6302 were read to require all States to await the completion of all such requests for proposals, FirstNet would likely constrain the range of RFPs it might otherwise conduct to avoid substantial delays nationwide, and in doing so constrain its ability to reflect the input from consultative parties.

Second, such a "wait for all" approach could, depending on how such requests for proposals are issued, nevertheless substantially delay implementation of the network in many or most States contrary to the Act's apparent emphasis "to speed deployment of the network." [45] For example, if a protest or litigation delayed proposals for one State or a region, the entire network could be held hostage by such litigation, creating substantial incentives for gamesmanship. Finally, if Congress had wanted such an extreme result, we believe it would have been more explicit than the generalized reference to "network" in subsection (e). [46] Thus, we preliminarily conclude that a State plan can be presented to a State upon the completion of the request for proposal process only to the extent necessary to develop such a plan for such State. We seek comments on this preliminary conclusion.

- I would hope this is the correct conclusion for the reasons stated. If the RFP process is ONE process for the entire country then the entire process has to be complete before the first state gets a chance to decide how to proceed with the RAN.

An additional question regarding the interpretation of the term "completion" in subsection 6302(e) concerns the specific stage of the request for proposal process that constitutes such "completion." The process prescribed by the Act itself may impose a practical limit on the extent of such completion. Although we interpret the effects of a State decision to assume RAN deployment responsibilities in detail in subsequent sections of this *Second Notice,* for purposes of our discussion here it is important to note that although a Governor's decision to assume RAN responsibilities is on behalf of his or her State, depending on the interpretations discussed below, an individual State's decision could materially affect all other States and thus the request for proposal process.

For example, depending on such interpretations, if a State chooses to assume RAN responsibilities, it potentially takes with it subscriber fees and/or excess network capacity fees that would have helped fund the FirstNet network in all other States. [47] Independent of funding issues, by assuming RAN responsibilities the State also reduces FirstNet's costs, at least with regard to the RAN, but also the volume of purchase from a potential vendor. The net amount of such reduced funding and costs, and the impact to economies of scale, determines whether all other States will have a net reduction in available funding and/or increased costs due to the opt-out. [48]

Given this dynamic, the specific States, and number thereof that choose to assume RAN responsibilities will affect, potentially materially, the final awards in the request for proposal process. [49] The funding level in particular will determine the amount and quality of products and services FirstNet can afford for public safety in the request for proposal process to construct the network. In addition, the information on the specific and number of opt-out States is an important factor determining economies of scale and scope represented by the FirstNet opportunity to potential vendors (and thus their pricing to and the determination of costs for FirstNet).

Under the Act, however, FirstNet must "complete" the request for proposal process before presenting plans to the States and obtaining this important information. States will, of course, want their plans to provide as much specificity regarding FirstNet's coverage and services as possible, which would ideally be determined on the basis of the final outcomes of the request for proposal process (which, as is

discussed above, ideally requires the State opt-out decisions). Accordingly, because of the circularity of these information needs, FirstNet may not be able to provide the level of certainty in State plans that would ordinarily be assumed to emerge from the final award of a contract to a vendor to deploy in a State. Thus, we preliminarily conclude that "completion" of the request for proposal process occurs at such time that FirstNet has obtained sufficient information to present the State plan with the details required under the Act for such plan, which we discuss below, but not necessarily at any final award stage of such a process. We seek comments on this preliminary conclusion.

- The whole series of questions gives a state leeway to develop a plan that will allow the state to make informed decisions.
- The other side of the equation is that FirstNet delivers a plan too early that would not have a clear coverage plan, business plan, policies, etc.
- Agree. Although I think it will be critical for all States to know what the plan is for neighboring States with a degree of certainty.

iii. Content of a State Plan

FirstNet must provide to the Governor of each State, or a Governor's designee, "details of the proposed plan for build out of the [NPSBN] in such State." [50] Section 6302 does not provide express guidance as to what are the "details of the proposed plan" that must be provided. Other provisions of the Act, however, provide some guidance in this regard.

Because the plan details are to be provided upon completion of the RFP process, we can of course reasonably conclude that such details are contemplated to include outputs of such process, as discussed in the previous section of this *Second Notice.* [51] Further, Section 6206(c)(1)(A) requires that FirstNet include in RFPs "appropriate" timetables for construction, coverage areas, service levels, performance criteria, and other "similar matters for the construction and deployment of such network." [52] Therefore, it is reasonable to conclude that Congress expected that FirstNet would be able to include at least certain outcomes of the RFP process on such topics in a State plan for the State in question. This is particularly true with regard to construction and deployment of the RAN, regarding which the Governor must make a decision in response to being presented with the plan. We note that Section 6302(e)(1)(B) states that the details provided are for the buildout of the network "in such State" only, although FirstNet may choose to include details of, for example, core functionality that will be implemented nationally or outside the State with benefit to the State.

Other sections of the Act provide further insight as to what should be included in a State plan. A State that seeks to assume responsibility for the RAN in the State must present an alternative plan to the FCC that "demonstrate[s] . . . interoperability with the [NPSBN]." [53] Thus, the State must at that point have knowledge of how such interoperability can be achieved, either through receipt of FirstNet network policies or the FirstNet plan for the State, or both. Further, in order for a State to obtain grant funds or spectrum capacity, it must "demonstrate . . . that the State has . . . the ability to maintain ongoing interoperability with the [NPSBN] . . . and the ability to complete the project within specified *comparable* timelines specific to the State." [54] Thus, for example, implicitly the State must have been presented with FirstNet timelines with which NTIA may "compare" to the State alternative plan.

In order to obtain grant funds or spectrum capacity, a State must also "demonstrate . . . the cost-effectiveness of the State plan . . . and . . . comparable security, coverage, and quality of service to that of the [NPSBN]." [55] Thus, similar to the timelines discussed above, implicitly the FirstNet plan (in

combination with FirstNet network policies) must provide the State with sufficient information to enable NTIA to make comparisons of cost-effectiveness, security, coverage, and quality of service. We seek comments on the above preliminary conclusions regarding the minimum legally required contents of a FirstNet plan for a State. [56] Finally, as discussed above, we preliminarily conclude that certain limitations regarding plan content are inherent in the plan process prescribed by the Act. [57]

- The issue is that in addition to information about the RAN plan, the Governor needs information about the core network to make a decision; what are the assumptions with the core network…capacity, accessibility, interoperability, etc.; if FirstNet does not share what the rest of the network looks then how will a state know what those assumptions are; core network functionalities will give states a target to develop their RAN plan; FirstNet needs to provide core functionality to all states and without that the Governor does not have enough information to make a decision; states should not be able to individually negotiate core network functionalities…they need to be the same from state to state for interoperability.

- FirstNet needs to have a process to amend the state plan; plan should include what the next phase(s) looks like; there needs to be a life cycle management plan with distribution of revenue for upgrading and sustaining the network.

iv. Governor's Role in the State Plan

Section 6302(e)(2), entitled "State decision," is clear that "the Governor shall choose" whether a State participates in the FirstNet proposed plan or conducts its own deployment of a RAN in such State. [58] Thus, we preliminarily conclude that the decision of the Governor in this regard will, for purposes of the Act, be binding on all jurisdictions within such State.

- At the end of the day, the issue of opt-in or opt-out is a state decision; it makes senses that you can't have sub-jurisdictions making the decision (they would not have the financial means to build a RAN); issues with sub-jurisdictions should not bar the state from making the decision.

- Agree that Governors decision is binding on all jurisdictions within such State and FirstNet should take no action that would seek to undermine that decision.

For example, if the Governor of a State decides the State will participate in FirstNet's plan for buildout of the State, a city or county within the State would not be able to separately choose to deploy a RAN. [59] Aside from the clear language of the Act regarding the Governor's role and decision, such sub-State level opt-out, if permitted, could create potential islands of RANs which do not meet the interoperability and other similar goals of the Act, and FirstNet would have to agree to use of its spectrum in such cases. We note, however, that FirstNet and a State could agree that, as part of FirstNet's plan, FirstNet and the State (or sub-State jurisdictions) could work together to permit, for example, State implementation of added RAN coverage, capacity, or other network components beyond the FirstNet plan to the extent the interoperability, quality of service, and other goals of the Act were met. These further customizations of State deployments over time may form an important aspect of the FirstNet implementation nationwide. These additions have been raised in consultation with state and local jurisdictions and could improve the network and provide additional coverage. We seek comments on the above preliminary conclusions. We also seek comments, considering the provisions of the Act and other applicable law, on the effect of both, a Governor's decision to participate in FirstNet's plan for a State, and a Governor's decision to apply for and assume RAN responsibilities in a State, on tribal jurisdictions in such a State.

- A tribal representative observed that the opt-in / opt-out not a tribal concern – just a concern on what coverage, access they will have and what they know is coming such as potential cost issues. The level of inclusion is a concern. Some states will have issues.

- If the additional build-outs for coverage enhancement were done by the State in a "mini opt-out" would FirstNet still collect all the revenues and manage the RANS or would that subset of the FirstNet system revert to full state operation control? Same question as to how it would be administered in the State built piece?

v. Timing and Nature of State Decision

Section 6302(e)(2) requires that the Governor make a decision "[n]ot later than 90 days after the date on which the Governor of a State receives notice under [Section 6302(e)(1)]." [60] This phraseology raises the question as to whether a Governor could make such a decision prior to receiving such notice. We preliminarily conclude that the Governor must await such notice and presentation of the FirstNet plan prior to making the decision under Section 6302(e)(2). The language of Section 6302(e)(2) creates a 90-day period "after the date" the notice is received, and the decision is clearly designed to be informed by the FirstNet plan.

- Generally agree.

- It seems unreasonable to require a Governor to make a decision in 90 days; why would you tie the Governor's hands in making a decision; why would you limit the decision making timeline? The Governor should have the time to collect all info need to make an informed decision.

In addition, any alternative interpretation would not fit within the process contemplated by the Act. Even if a State were able to make a qualifying decision prior to such notice, and we preliminarily conclude it could not, such a decision would trigger the 180-day clock for submitting an alternative plan to the FCC, discussed below. Without a FirstNet plan having been presented, the State's premature decision would not enable the FCC to make the assessments required to approve the State's alternate plan, or if such plan is approved, enable NTIA to review and determine whether to grant an application for grant funds and/or spectrum capacity. For example, without the FirstNet plan, a State would not be able to demonstrate to the FCC that its alternative RAN would be interoperable with the yet-unspecified FirstNet core network interconnection points within the State. Nor would a State be able to demonstrate "comparable" timelines, security, coverage, or quality of service, as required by Section 6302(e)(3)(D). [61] Thus, the Governor's premature decision, prior to a FirstNet plan, would likely be unworkable under the requirements in the Act. [62] We seek comments on this preliminary conclusion.

vi. Notification of State Decision

The Act does not require the Governor of a State to provide notice of its decision to participate in the FirstNet proposed network under Section 6302(e)(2)(A) to FirstNet, or any other parties. Rather, notice is only required, as is discussed in detail below, should the Governor of a State decide that the State will assume responsibility for the buildout and operation of the RAN in the State. [63] Thus, we preliminarily conclude that a State decision to participate in the FirstNet proposed deployment of the network in such State may be manifested by a State providing either (1) actual notice in writing to FirstNet within the 90-day [64] decision period or (2) no notice within the 90-day period established under Section 6302(e)(2). We seek comments on these preliminary conclusions.

- A preliminary State RAN design based on known parameters could be ready prior to the Governor receiving the notice, but it could take all of the 90 days (or more) to make sure that design met all the FirstNet requirements. I agree that deciding prior to receipt of the notice doesn't even make sense. Also even with a preliminary design ready before the notice, 90 days to make sure it can meet the interoperable requirements and 180 additional days to make it into a bullet proof alternative plan is going to be a major undertaking.

- Why would there be automatic participation if a state does not notify within 90 days? The concern is the 90 day window; concerned that there is an automatic opt-in without the Governor providing notification either way.

Read literally, the 90-day period established under Section 6302(e)(2) applies to the Governor's decision, rather than the notice of such decision, which is addressed in Section 6302(e)(3). We preliminarily conclude, however, that it is clear from the language of Section 6302(e)(3) that the notice is to be provided to FirstNet, NTIA, and the FCC "[u]pon making a decision . . . under paragraph (2)(B)." [65] Thus, we interpret the requirement to issue such notice as an immediate (*i.e.*same day) requirement, and that Congress did not intend to apply an artificial deadline on the Governor's decision, and then permit an indefinite period to lapse before providing notice of such decision. Such an indefinite period would run contrary to the Act's emphasis on the "speed of deployment" of the network for public safety. [66] We seek comments on this preliminary conclusion.

- No comment.

vii. The Nature of FirstNet's Proposed State Plan

The Act describes what FirstNet is to propose to each State as a "plan."[67] Section 6302 describes a process for the implementation of the nationwide public safety broadband network in each State. [68] FirstNet's presentation of a plan to the Governor of each State for buildout in that State and his/her decision to participate in such buildout as proposed by FirstNet or to deploy the State's own RAN are important steps of this process. However, we preliminarily conclude that FirstNet's presentation of a plan to a Governor and his/her decision to either participate in FirstNet's deployment or follow the necessary steps to build a State RAN, do not constitute the necessary "offer and acceptance" to create a contract.

- Agree. However, the Governor is making a decision based on a Plan by FirstNet to deploy the RAN in a specific way. If FirstNet were to alter that plan in any material way, such as priority or timing of build-out, than a State should be allowed to similarly alter their decision. Conversely, if FirstNet presents an alternate plan to a State after a State has decided to assume responsibility for their RAN, a State should be able to revert back to FirstNet providing the RAN.

Nowhere does the Act use words of contract, such as "offer," "execute," or "acceptance" in relationship to the FirstNet plan. For example, a Governor's decision is whether to "participate" in the FirstNet plan. The Act provides the Governor with 90 days to make a decision once presented with the plan, which would be an extremely short period within which to negotiate a final contract of this magnitude if a contract were contemplated. Notwithstanding this preliminary conclusion, a State would, however, ultimately benefit from any contractual remedies that FirstNet can enforce against its contracting parties for deployment of the network in the State.

In addition, we believe this interpretation is reasonable given that establishing the plan as a contract between FirstNet and a State would likely be unrealistic in light of the nature of the FirstNet program. For example, as discussed above, the process prescribed in the Act itself may make contract-like promises at the plan stage difficult. [69] In addition, subscriber adoption and fees will form an important funding and self-sustaining basis for FirstNet, dictating at least part of the scope of its ongoing buildout, features, and timing. These levels of subscriber adoption and fees across the network overall will not be known at the State plan stage and will likely be express assumptions thereunder.
Unlike the plan itself, however, when public safety entities subscribe to FirstNet's services, those subscription agreements are expected to take the form of contracts with FirstNet, including contractual remedies in the event FirstNet service does not meet promised-for service levels. Similarly, to the extent FirstNet enters into contracts with State or local agencies for use of local infrastructure, those contracts will be negotiated and presumably contain contractual remedies for both parties. [70] We seek comments on the above preliminary conclusions.

viii. State Development of an Alternative Plan

Section 6302(e)(3)(B) requires, not later than 180 days [71] after a Governor provides a notice under Section 6302(e)(3)(A), that the Governor develop and complete requests for proposals for construction, maintenance, and operation of the RAN within the State.[72] We believe the Act imposes this 180-day period to ensure that the public safety entities in and outside the State gain the benefit of interoperable communications in the State in a reasonable period of time, either through the FirstNet plan or a State plan.
Consistent with our preliminary interpretation of the “completion” of the FirstNet request for proposal process, [73] we preliminarily conclude that the phrase “complete requests for proposals” means that a State has progressed in such process to the extent necessary to present an alternative that could demonstrate the technical and interoperability requirements described in Section 6302(e)(3)(C)(i). [74]

- No Comment.

Like FirstNet, States will potentially have gaps in information at the time of their request for proposal process, and subsequently at the time of their submission of an alternative plan. For example, to the extent such States have not negotiated at least the material parameters of a spectrum capacity lease agreement with FirstNet at the time of an RFP, they will be unable to finally determine the terms, which may be materially affected by such parameters, of any covered leasing agreement (“CLA”) the State would enter into to offset some or all their costs of construction. Nor will NTIA have potentially approved of such spectrum capacity leasing rights at that point. Thus, we encourage States that may contemplate such a process to engage FirstNet as early as possible to increase the specificity of the alternative plans they can present to the FCC and NTIA.
In keeping with this interest in timely network deployment, we preliminarily conclude that where a State fails to “complete” its request for proposal process in the 180-day period under the Act, the State would forfeit its ability to submit an alternative plan in accordance with paragraph (e)(3)(C). [75]

- We agree with this conclusion.
- FirstNet needs the ability to plan out financials of the network therefore there is a need to be a cutoff date for state planning of a RAN in an opt-out situation.

- If a state decides to participate and a large number of other states opt-out yet eventually can't deliver their portion then it will impact how our network gets built (especially bordering states). There needs to be a certain level of understanding of what the network will look like and it can't be left open.

This forfeiture would result in the construction, maintenance, operations, and improvements of the network within the State proceeding in accordance with the FirstNet plan. We expect that the FCC will establish procedures regarding the filing of alternative State plans where States have completed their requests for proposal in a timely fashion. We seek comments on these preliminary conclusions.

ix. Responsibilities of FirstNet and a State Upon a State Decision To Assume Responsibility for the Construction and Operation of Its Own RAN

Under Section 6302(e)(3)(C)(ii), States with alternative plans approved by the FCC may apply to NTIA for a grant to construct a RAN within that state and must apply to NTIA to lease spectrum capacity from FirstNet. [76] We preliminarily conclude that approval by the FCC of an alternative State plan results in that State being solely responsible for the construction, operation, maintenance, and improvement of the RAN in such State in accordance with the State's approved plan, thereby extinguishing any obligation of FirstNet to construct, operate, maintain, or improve the RAN in such State. [77]

- No Comment.

Certainty as of the date upon which the FCC approves or disapproves the alternative plan is important for FirstNet in determining the final economics of its network and business planning and thus its ability to move forward, with vendors and otherwise, in that and other States. We seek comments on this preliminary conclusion.
The Act, however, does not provide a mechanism for a State, following an FCC-approved State RAN plan, to reinitiate an "opt-in" process where FirstNet would assume the duty to build the NPSBN in that State. For example, if the sequence of events ended with a State receiving approval of its alternative plan by the FCC but being unable to reach agreement on a spectrum capacity lease with FirstNet or being denied approval of such spectrum capacity leasing rights or needed grant funds by NTIA, the State subsequently would be unable to operate the RAN in the State. Although we intend to work closely with the FCC, NTIA, and States to try to anticipate and avoid any such unnecessary process issues, we preliminarily conclude that the inability of a State to implement its alternative plan for such reasons would not preclude a State and FirstNet from agreeing to allow FirstNet to implement the RAN in such State.

- At the end of the day these steps are necessary; the state does not know what the funding model looks like and could create issues; NTIA funding levels and FCC approval should happen at the same time so there is no delay or issues during the state plan approval process.

- This section is a mess of chicken and egg issues. States need to make a decision before all the information is available to them, such as CAPEX costs, requirements, OPEX, etc. I think a more iterative State opt-in/opt-out process could work better. States could issues "intents" to opt-in/opt-out, pending a timeline for additional information from FirstNet. Not sure if this would fully satisfy the problem, as each individual states decision would affect the costs! Kind of like a snake eating his tail.

FirstNet's duty is the deployment of the network nationwide, and deployment in all States greatly benefits the nation as a whole. As such, we do not believe Congress intended to put such States in limbo with regard to the NPSBN.
Further, because such uncertainty in any one State would affect the benefits of the NPSBN nationwide, we preliminarily conclude that denial by NTIA of at least the spectrum capacity leasing rights would then permit FirstNet to implement a plan in the State. [78]

- No Comment.

Absent this interpretation, any one State could indefinitely delay, among other things, construction of the network in such State, the funding derived from spectrum capacity leases in such State, and the positive effects of economies of scale and scope from construction and operation in such State, all to the detriment of all other States and citizens through the effect on the FirstNet program. In the absence of express provisions under the Act, we believe this preliminary interpretation appropriately balances Congress' intent to have a nationwide network implementation as soon as possible with the rights of States to conduct their own RAN deployment if, and only if, they can meet the requirements under Section 6302(e)(3). We seek comments on this preliminary conclusion and any alternative processes that meet the requirements of the Act.
Beyond the above scenarios, if a State initially enters into a spectrum capacity lease with FirstNet and receives all necessary approvals, because of FirstNet's authority to enter into contracts with State and local agencies, we preliminarily conclude that a State may ultimately seek to have FirstNet, assuming mutually acceptable terms, take over some or all RAN responsibilities in the State through a contractual agreement. [79]

- No Comment.

Given the benefit to the nation of a functioning network within all States, we believe this capability is important in the event, for example, that a State plan fails after approval and execution of a spectrum capacity lease. We seek comments on these preliminary conclusions.
Finally, under Section 6302(e)(3)(C)(iv), if the FCC disapproves an alternative State plan, the construction, maintenance, operation, and improvements of the radio access network in that State will proceed in accordance with the State plan proposed by FirstNet. [80] Thus, we preliminarily conclude that once a plan has been disapproved by the FCC, subject only to the additional review described in Section 6302(h), the opportunity for a State to conduct its own RAN deployment under Section 6302(e) will be forfeited, and FirstNet may proceed in accordance with its proposed plan for that State. [81] This certainty of obligation is important for both FirstNet planning regarding self-sustainability and to ensure that the network is built in a timely manner. We seek comments on these preliminary conclusions.

- No Comment.

Note: This document has been prepared so that the requests for comment can be more easily identified and reviewed. The official Second Notice and Request for Comment is located on the Federal Register website - (https://federalregister.gov/a/2015-05855).

D. Customer, Operational and Funding Considerations Regarding State Assumption of RAN Construction and Operation

i. Overview

Having discussed above many of the procedural aspects of a State's decision to assume RAN responsibilities, we turn to some of the potential substantive ramifications of such a decision. Importantly, and as is also discussed above, these ramifications can reach beyond the borders of the State making the decision. They include potential effects in and outside the State on public safety customers, FirstNet's costs and available funding nationally, including its ability to meet substantial rural milestones, and the purchasing power of FirstNet on behalf of public safety. In addition to these critical considerations, in order to achieve the goals of the Act following a State decision to assume RAN responsibilities, FirstNet and such a State must in all cases define and implement a potentially complex operational relationship to serve public safety.

In arriving at the preliminary interpretations below, we endeavored to remain faithful to the balance Congress struck between the deployment of a nationwide network as soon as practicable, and the right of States to deploy their own RAN under the conditions outlined in the Act. The most difficult of these preliminary interpretations relate to areas where the Act is either completely silent or provides only inferential guidance. These include topics such as who actually provides service to public safety entities in opt-out States, who receives and may use fees from such services and for what purposes, and whether Congress intended the right to opt-out under the Act to include, particularly with respect to fees for use of excess network capacity, the right to fundamentally affect the complex funding structure of the FirstNet program in all other States in favor of the State opting out.

We discuss below preliminary conclusions regarding these issues, but expect the highly complex legal and operational landscape in these areas to also mature over time, particularly in light of FirstNet consultations, including most importantly the comments received from this *Second Notice*.

ii. Customer relationships in State Assuming RAN construction and Operation

The Act does not expressly define which customer-facing roles are assumed by a State or FirstNet with respect to public safety entities in States that have assumed responsibility for RAN construction and operation. Generally speaking all wireless network services to public safety entities will require technical operation of both the RAN, operated by the State in this case, and the core network, operated by FirstNet in all cases as we preliminarily concluded in the *First Notice*.[82] We received predominantly supportive comments in response to this preliminary conclusion in the *First Notice,* with some commenters suggesting flexibility, on a State-by-State basis, in the precise delineation of technical and operational functions performed by the FirstNet core network and States assuming RAN responsibilities in such States. [83] A core network, for example, would typically control critical authentication, mobility, routing, security, prioritization rules, and support system functions, including billing and device services, along with connectivity to the Internet and public switched network. The RAN, however, would typically dictate, among other things, the coverage and capacity of last mile wireless communication to customer devices and certain priority and preemption enforcement points at the wireless interface of the network. Either alone is an incomplete network and each must work seamlessly with the other. As a result, FirstNet and such States must similarly work together to ensure that public safety is provided the critical wireless services contemplated by the Act.

These technical and operational functions and interactions between the RAN and core network, however, can vary to a limited extent that would not necessarily jeopardize the interoperability goals of the Act. FirstNet preliminarily concludes that it will maintain a flexible approach, advocated by some

States in their comments to the *First Notice,* to such functions and interactions in order to provide the best solutions to each State so long as the interoperability and self-sustainment goals of the Act are achieved. [84] The allocation of such technical and operational functions, however, does not entirely dictate who assumes public safety customer-facing roles, such as marketing, execution of customer agreements, billing, maintaining service responsibility, and generating and using fees from public safety customers. States assuming RAN responsibilities could, for example, operate as partial resellers or enter into Mobile Virtual Network Operator ("MVNO")-like arrangements [85] with FirstNet to use part or all of its core network to offer service to public safety entities in a State. Alternatively, such States could act as a RAN supplier to FirstNet, customizing the RAN to local needs but placing the responsibility with FirstNet to market, serve, and bill public safety entities in the State. There are a variety of such possible arrangements, and we preliminarily conclude below that the Act provides sufficient flexibility to accommodate many of them so long as the interoperability and self-sustainment goals of the Act are met.

- This conclusion also relates to the network policies section in this notice? It does provide flexibility broadly (FirstNet as a whole) - Could be inflexible due to network policies.
- The act is flexible but issues are complex. Need to make sure the best practices are followed to ensure meeting the needs of the customers.
- Question: Who, in this scenario, handles the device management issues? I didn't see that in the list of customer-facing items.
- We like flexibility but caution that too much may hinder cross-state interoperability, deployed resources getting confused, device incompatibility during an incident or deployment.
- On the customer facing aspect of the operation of the network, regardless of opt-in/opt-out, there needs to be a centralized customer facing point of contact for the "NETWORK, to include RAN's and core network, as well as applications. This should be a hierarchal support model under the first point of contact, moving down the chain from FirstNet to state, to local jurisdictions as appropriate.
- From a traditional IT operational model, it would be chaos if the end user/customer would have different operational contact for different perceived problems. Is it an application issues, transport issues (RAN) commercial carrier (RAN), routing, configuration or security issue (core network), backhaul connectivity, etc?

We first note, as we preliminarily concluded in the *First Notice,* that the State decision is as to whether to control deployment of the RAN, not the core network, and as is discussed above, the RAN alone is insufficient to offer wireless service. Under Section 6302(f), FirstNet is authorized to charge States assuming such RAN responsibilities user fees for "use of elements of the core network." [86] This clause could be interpreted as evidence of Congress' contemplation of such a State's use of the FirstNet core network to provide service to public safety entities in a resale or MVNO-like arrangement. But there are a variety of circumstances, other than providing end user services, under which a State may want to use elements of the FirstNet core network. For example, the FirstNet core network would have to be used to enable RAN sharing as specified by the Interoperability Board Report in connection with a CLA between the State and a third party. In addition, if the State itself subscribed to FirstNet services, because the State is responsible for the RAN, the State and FirstNet would have to negotiate an agreement addressing, among other things, State use of the core network. Thus, this clause alone does not,

generally speaking, appear to indicate one way or another who is to be the customer-facing service provider in a State that has assumed RAN responsibility and could provide flexibility in this regard. Similarly, Section 6302(e)(3)(D) indicates that such a State is to "operate . . . the State radio access network" and "maintain ongoing interoperability with the [NPSBN]." [87] Neither of these requirements necessarily indicates a customer-facing role. The State is expressly operating the RAN, not the NPSBN as a whole in the State. Thus, these clauses similarly do not appear to be restrictive in this regard.

The Act requires that States seeking to obtain grant funds or spectrum capacity leasing rights must demonstrate "comparable . . . quality of service to that of [FirstNet]." [88] This provision implies that States building and operating a RAN are at least providing a "quality of service" to someone. For example, the clause could mean that because the RAN is part of the network that FirstNet is using to provide service to a public safety customer, the State must demonstrate that this ultimate level of service from FirstNet will not be diminished relative to what FirstNet would provide under its plan. Alternatively, the provision could be interpreted as contemplating a State providing a quality of service to end user customers. Again, this clause does not appear to clearly require one or the other customer-facing roles.

Another important provision relevant to this determination precludes States that assume RAN responsibility from "provide[ing] commercial service to consumers or offer[ing] wholesale leasing capacity of the network within the State except directly through public-private partnerships for construction, maintenance, operation, and improvement of the network within the State." [89] This provision could imply that such States are otherwise contemplated to provide commercial services to non-consumers (*e.g.,* public safety entities) within that State. This interpretation, however, based on implication, is not required by the provision, which could merely be formulated to avoid precluding the intended use of the State RAN for service provision by FirstNet to public safety. The implication may support the flexibility discussed above, although Congress was express and overt elsewhere in the Act in authorizing a customer-facing relationship. [90]

Section 6208 and Section 6302 expressly authorize FirstNet and a State assuming RAN responsibilities, respectively, to enter into CLAs. [91]Only Section 6208, however, which authorizes "[FirstNet] . . . to assess and collect . . . fees," identifies "user or subscription fee[s] . . . including . . . from . . . any public safety entit[ies]." [92] That is, Congress expressly authorized both FirstNet and States to enter into CLAs, but only expressly provided for FirstNet to charge public safety entities for user or subscription fees. Because Congress took the step of expressly authorizing the State to exploit federally-licensed spectrum using one method (public private partnerships ("PPPs")/CLAs), and, unlike FirstNet, not another (subscriber fees), a potential interpretation of the Act with respect to these provisions is that FirstNet is intended to be the customer-facing service provider for public safety entities in States that assume RAN responsibilities, or is at least the only entity permitted to assess subscription fees to public safety entities. Such an interpretation would also be supported by the existence of provisions under the Act, more fully discussed below, requiring FirstNet to reinvest subscriber fees *as well as* excess network capacity fees into the network, whereas the only reinvestment provision expressly applicable to States assuming RAN responsibilities concerns excess network capacity fees. This too could indicate that such States, as RAN providers, were not intended to assess subscription fees because if they were intended to do so, Congress would have required their reinvestment into the network (as they did with State CLA fees). [93]

We preliminarily conclude, however, that although the above provisions could indicate a Congressional intent to have FirstNet be the primary customer-facing entity at least with regard to the fees assessed public safety entities, a reasonable interpretation of all the provisions discussed above, including both operational and fee-related, would not preclude opt-out States, as sovereign entities, from charging subscription fees to public safety entities if FirstNet and such States agreed to such an arrangement in

the spectrum capacity lease with the States, and the arrangement was part of an alternative plan approved by the FCC and NTIA. We seek comments on this preliminary conclusion.

- Opt-out states being able to charge subscription fees seems appropriate; FirstNet hasn't been open to the potential of spectrum leasing and how valuable it is…this element would be a factor if a state opts in or opts out.

- Three different perspectives

  (1) The intent to benefit Public Safety and other entities to do their job
  (2) Value to states to build a better network
  (3) Quality and standards would be uniform throughout the network

  FirstNet should be the customer facing entity; states collecting funds could create a taxing jurisdiction and could be an issue; operational responsibilities should be the states responsibility as much as possible; states that opt-out and build a gold plated network, it would be a detriment to the network nationwide.

- Agreed, FirstNet should be collecting the fees and not the states.

- The state plan should include a 5-7 year plan for reinvestment from FirstNet and the needs of sustainment from the state itself. This also relates to "rural milestones".

- For opt-out states, this plan could provide some comfort financially to forecast what monies should be put away for rainy day fund.

- I would worry about state leaders sweeping the fees like they did with 911 fees.

- Uniformity on billing (and only FirstNet collects) and the RAN portion goes to FirstNet / or the opt-out state to build/maintain the RAN in that state?

In addition to affording flexibility with respect to FirstNet's role, because of the lack of definitive language in the Act discussed above, we also preliminarily conclude that the Act does not require that such States be the customer-facing entity entering into agreements with and charging fees to public safety entities in such States. In particular, our conclusion is based on the absence of provisions in the Act requiring such a result, as discussed above, and the inclusion of provisions, such as those regarding the assessment and reinvestment of subscriber fees, that at least clearly authorize, if not contemplate the opposite result.
Accordingly, we preliminarily conclude that the Act provides sufficient flexibility, as discussed above, to allow the determination of whether FirstNet or a State plays a customer-facing role to public safety in a State assuming RAN responsibilities to be the subject of operational discussions between FirstNet and such a State in negotiating the terms of the spectrum capacity lease for such State, in addition to the approval of the State's alternative plan by the FCC and spectrum leasing rights and any grant funds by NTIA. We seek comments on these preliminary conclusions.

- Customer facing role for operations is beneficial for a state; this could be a gateway into funding and FirstNet should step in when this happens.

- When resources come in from out of state, who do they call for priority levels, access, etc.? I have a concern with states managing this.

- If the RAN is built to FirstNet specifications, is part of FirstNet network, and if it is most efficient to have FirstNet be the universal customer-facing agent, then that makes the most sense. Otherwise could be confusing at the responsibility hand-off points.

Our preliminary interpretations above attempt to maintain the balance between, on the one hand, construction of a nationwide architecture and interoperable operation of the network, and on the other hand, a State's opportunity to design and deploy a RAN that meets the particular coverage, capacity, and other needs of the State. Our interpretations leave room for the flexibility advocated by some States in response to our *First Notice* in order to provide the best solutions in each State while adhering to the goals of the Act.

However, under all these possible scenarios—where an opt-out State or FirstNet is playing customer-facing service provider roles to public safety entities—the splitting of responsibilities for the network at the interface between the RAN and core network will present substantial operational complexities. A resale or MVNO-like arrangement permitting States that assume RAN responsibilities to offer service to public safety entities could create disparities in, among other things, terms and conditions, service/feature offerings and availability, priority and preemption governance schemes, and pricing and billing practices between opt-out States and opt-in States. These disparities, in addition to jeopardizing interoperability, could also reduce subscription to and use of the NPSBN by adding complexity, implementation risk, and confusion among public safety entities. Although some of these disparities could be addressed in the opt-out process and network policies implemented by FirstNet, and/or mitigated in agreements between FirstNet and opt-out States, such a structure could be inconsistent with the goals of the Act to establish "a nationwide, interoperable public safety broadband network . . . based on a single, national network architecture." [94]

FirstNet's customer-facing role in providing services to public safety entities in opt-out States, although potentially mitigating many of the above difficulties, would present different issues, such as RAN coverage and capacity planning, investment, and reimbursement debates between FirstNet and such States. [95] Under the variety of possible scenarios enabled by commercial network standards, FirstNet and States assuming RAN responsibilities will have to work together over many years with the best interests of public safety in mind to address myriad operational issues. [96]

iii. State Use and Reinvestment of Funds Received From Building and Operating a RAN

FirstNet has three primary sources of funding: (1) Up to $7 billion in cash; (2) subscriber fees; and (3) fees from excess network capacity leases (known as CLAs) that allow FirstNet to sell capacity not being used by public safety to commercial entities. [97] Each of these funding sources is critical to offset the massive costs of the nationwide broadband wireless network envisioned in the Act and the self-sustainability required of FirstNet under the Act.

State opt-out decisions could, however, depending on the interpretations below, materially affect FirstNet's funding and thus its ability to serve public safety, particularly in rural States. If a State receives approval to opt-out it could theoretically tap into or entirely supplant each of the three primary FirstNet funding sources within the boundaries of the State. More precisely, depending on such interpretations, a State that assumes RAN responsibility could tap into or supplant these funding sources in an amount that materially exceeds the amount of resources FirstNet (or a reasonable State plan) would have allocated to serve that State. [98]

For example, once a State receives approval of its alternative RAN plan from the FCC, the State must apply to NTIA for a spectrum capacity lease from FirstNet. [99] Section 6302(g) then permits a State to enter into CLAs, using the spectrum capacity leased from FirstNet to offset the costs of the RAN. The Act does not specify the terms governing the lease nor the amount of spectrum capacity for which a State

may apply, only requiring any fees gained to be reinvested into the RAN “of the State.” [100] Assuming for the moment that such a State receives all necessary approvals and enters into a lease with FirstNet for use of all of FirstNet's spectrum capacity in the State, and such a State is the billing service provider to public safety entities in the State, then all public safety subscriber and excess network capacity fees generated in the State would go to and remain in the State other than any core network fees assessed by FirstNet.

Generally speaking, States with high-density populations may generate subscriber and/or excess network capacity fees for FirstNet that materially exceed their RAN costs to FirstNet. Thus, if such a State opts out of the FirstNet plan, and the Act is interpreted to allow such States to keep any or all of the fees from such States that exceed RAN costs within the State (assuming even an expanded RAN in the State alternative plan relative to FirstNet's plan), then funding for all other States could decline because FirstNet will not receive the funding for use outside the State. [101] That is, because FirstNet must aggregate fee amounts across all States for reinvestment and use by all States, [102] if a State is able to withhold fees materially in excess of those FirstNet was going to allocate to the State (beyond the avoided cost of the RAN and core network fees, and accounting for any plan differences between FirstNet and the State), funding for all other States would materially decline. This circumstance could have a detrimental impact on both the funds available to maintain and improve the NPSBN on an ongoing basis as well as adversely affect the cost of services to public safety users.

Thus, if a State believes it can generate and withhold such fees for its own use under the Act, it may have at least a theoretical economic incentive to opt-out. Again assuming the Act is interpreted this way, our preliminary estimates indicate that very high density States may have such an incentive, although only the request for proposal processes and actual operations will determine this for certain.

Accordingly, if the Act is interpreted in this manner, it has a built in incentive structure for a few States to opt-out and retain, for reinvestment or otherwise in such States, fees that could materially reduce FirstNet coverage and services in all other States, including States with more rural areas.

We believe as a general matter that Congress did not intend for a few, high-density States to be able to withhold material funding for all other States under the Act. Such an incentive structure, even if reinvestment in the State network were always required in opt-out States, could result in networks that greatly exceed public safety requirements in a few opt-out States (or funds diverted to State general funds), and networks that do not meet public safety requirements and the goals of the Act in the vast majority of States. Nothing in the Act indicates that such a result was contemplated, particularly given FirstNet's duty to ensure the deployment of a “nationwide” network that includes “substantial rural coverage milestones as part of each phase of the construction and deployment of the network.” [103] We do not believe this was the balance Congress intended to strike between establishing a nationwide network and providing States an opportunity, under certain conditions, to customize and operate the RAN portion of the network in their States.

Congress' intent in this regard is informed by, among others, the provision in Section 6302(e)(3)(D) that requires that a State wishing to assume RAN responsibilities demonstrate “the cost-effectiveness of the State plan” when applying to NTIA not just for grant funds, but also for spectrum capacity leasing rights from FirstNet, which are necessary for the implementation of a State RAN and could exceed the value of any grant funds over the life of the program. [104] Independent of NTIA's determination in assessing such an application, FirstNet, as the licensee of the spectrum and an independent entity within NTIA, must ultimately decide to enter into such a lease, and thus we analyze this provision in considering FirstNet's role and duties in relation to the State's proposed demonstration of the plan's “cost-effectiveness.” [105]

If a State presented a plan for a RAN deployment identical to FirstNet's but costing three times as much, a reasonable interpretation of this provision would indicate that if material, the amount in question would render such a plan not cost-effective (assuming the State was not using its own funds or

otherwise compensating for the cost difference). Two times the cost of the RAN would be wasted for the rest of the country. This straight-forward analysis of cost-effectiveness implicitly takes into account funding on a national basis, beyond the border of the State in question, because the State itself would receive the same RAN and the cost-inefficiency would only affect other States through FirstNet. Thus, by including a cost-effectiveness test, a straight-forward interpretation of the provision would indicate Congress' intent that State opt-out decisions do not unreasonably affect the resources of the network as a whole, or at the very least that such decisions only allocate resources to provide different or greater RAN coverage in a reasonable manner. [106]

In the case of a high-density State or territory, such as the District of Columbia, the value of public safety user fees and CLAs is likely much greater than a high-quality network's costs. That is, the effective cost of the RAN once subscriber and/or excess network capacity lease fees are taken into account is zero, and surplus fees are generated. Assuming for the moment that the State could generate the same (surplus) CLA fees that FirstNet could in the State, if the State were to present a plan that withheld such surpluses in the State itself, by analogy to the previous example, the rest of the States would be denied the benefits to the NPSBN afforded by the availability of such amounts to reduce the overall cost of services. Even if such a surplus were reinvested in the State's network, spending the surplus on only the network in that State may greatly exceed the reasonable needs of public safety in the State relative to those in other States. In addition to this inefficiency, if the Act were interpreted not to require reinvestment (discussed below) then any surplus fees diverted to State general funds would be drained from the FirstNet program and public safety in all States, including the opt-out State.

Exacerbating this effect, a single State (or even a group of States) negotiating a CLA for only such a State (or group) could yield substantially lower fees overall relative to what FirstNet would have generated. In the example above, the District of Columbia alone would likely generate lower fees than FirstNet would for the spectrum in the District because FirstNet would likely enter into a CLA that spanned the entire metro area of Washington, DC, including parts of Maryland and Virginia that, from a commercial carrier's perspective, are important to the value of the spectrum in the District. Furthermore, FirstNet's request for proposal process might reveal that a regional or national CLA would generate even greater fees attributable to the District (and the District with surrounding States) because of the seamless spectrum footprint across the region or nation. Of course, the opposite could also be true, that for some reason a State or group of States may be able to generate more fees from a CLA than FirstNet which, depending on the allocation of such fees between the State and FirstNet, could benefit all other States relative to the agreement into which FirstNet would have entered. These are important considerations materially affecting the value of the assets Congress provided to fund the program.

Accordingly, as a threshold matter, with respect to FirstNet's negotiation of a spectrum capacity lease with States seeking to assume RAN responsibilities, we preliminarily conclude that Congress did not intend such leases to enable materially cost-inefficient RAN plans or, more precisely, materially inefficient use of the scarce spectrum resources provided to the program, and it would be FirstNet's duty to consider the effect of any such material inefficiencies on, among other things, more rural States and on the FirstNet program in determining whether and under what terms to enter into such a lease.

- The concern is when you start subleasing spectrum especially in metro areas to generate revenue to build out in the rural areas; it could degrade services in the metro areas (free range leasing agreements).

- Urban states efficiency definitions could be shedding cost.

- The definition of efficiency should also include availability and Quality of Service (QoS) for public safety; subleasing may alter lease agreements but should always meet public safety availability and QoS or grade of service.

- Agree that all should be built to a minimum standard and that rural states might have higher costs of service.

- The definition of efficiency has to be defined and spelled out in policy – not a Star Chamber decision – definition of efficiency in rural states ought to be how much coverage they are getting over density of population vs highly dense, smaller state – efficiency is to shave costs for level of service. Get points to ship dollars to other parts of the network to help others.

- The term "materially inefficient" is difficult to measure especially when it is not a commercial network but a public safety network. What may be perceived as overbuilt and too expensive may, in a crisis situation, be barely enough to save your life.

The Act directs States with approved alternative RAN plans to "apply" to "NTIA to lease spectrum capacity from [FirstNet]." [107] It does not guarantee that NTIA will approve spectrum capacity leasing rights for a State, but rather sets out criteria that must be demonstrated to NTIA—including the cost-effectiveness of the plan—prior to receiving approval. FirstNet, however, as an independent authority within NTIA and as the licensee of the spectrum, has a duty to preserve the meaningful right of States to opt-out under the Act, but also additional duties imposed by the Act to ensure the deployment of the network nationwide and duties imposed by FCC rules as a licensee with respect to the spectrum and any capacity subleases thereof. We preliminarily conclude that FirstNet, in the exercise of such duties, can and must take into account, among other things, the considerations discussed above in whether and under what terms to enter into a spectrum capacity lease with a State. We seek comments on this preliminary conclusion. [108]

- We agree FirstNet should be a party with NTIA concerning leasing agreements.

- We agreed up to the point of conflict of interest - if a state proposes a cost efficient system that meets the requirements and doesn't waste spectrum, FirstNet shouldn't dis-allow spectral access because other states aren't as fortunate. Charging higher subscription rates to take care of other states could be viewed as a hidden tax.

FirstNet's proposed approach, however, would not result in a binary FirstNet position. FirstNet, in remaining faithful to the balance Congress struck in the Act, would work with States desiring to assume RAN responsibilities to evaluate potential "win-win" arrangements where the assets Congress provided are used efficiently but the right of States to assume RAN responsibilities under the Act's criteria is preserved. For example, FirstNet and such a State could agree, as part of the spectrum capacity lease and ultimately as part of the State's alternative plan presented to the FCC and NTIA, to leverage a FirstNet CLA if it presents a materially better fee return to the benefit of both the State in question and all other States. Such a State could become a contracting party with the same covered leasing partner, giving the State control of and responsibility for the RAN. If, taking into account the above-discussed potential effects on the program, a State is nevertheless able to enter into a more favorable CLA with a different covered leasing partner, then FirstNet and the State could agree on how such an agreement would benefit the State and the network as a whole. A variety of approaches could achieve "win-win" solutions, and FirstNet would be committed to exploring them within the bounds of the Act. We seek comments on such approaches.

With respect to the user fees generated from public safety customers in a State, we discussed in the previous section of this *Second Notice* our preliminary conclusion that FirstNet or a State assuming RAN responsibilities may ultimately receive such fees depending on the arrangement between FirstNet and the State under the spectrum capacity lease. Here, for the reasons discussed above, we preliminarily conclude that the Act should be interpreted to require that States assuming RAN responsibilities that charge end user subscription fees to public safety entities must reinvest such fees into the network and that FirstNet has a duty to consider both the reinvestment of such fees and the cost-effectiveness considerations discussed above regarding the distribution of such fees in entering into such a spectrum capacity lease.

- Agreed - personally, I'm more concerned about FirstNet or Congress being able to re-invest the revenues and not using them for something else than I am the State.

An alternative interpretation regarding reinvestment of subscriber fees—that Congress intended States to be able to divert such fee amounts to State general funds—would seem to have no basis in the structure and purposes of the Act, which carefully provides a reinvestment requirement for CLA fees assessed by States (and FirstNet) and when authorizing subscriber fees by FirstNet. [109] Subscriber fees may ultimately exceed those derived from CLAs in any one State, and it would make little sense for Congress to have intended loss of the former but retention of the latter for the network, with such losses potentially jeopardizing the interoperability and technical evolution of the network. At a minimum, the ability of States to provide end user services to public safety entities will ultimately depend on the scope of the spectrum capacity lease provided by FirstNet. Accordingly, we preliminarily conclude that, absent clear language to the contrary in the Act, FirstNet could impose such a reinvestment restriction within the terms of such a lease. We seek comments on these preliminary conclusions.

- We agree with this conclusion.
- Legislation did not intend for states to divert fees, spectrum lease funds into State General funds. There was clear language about reinvesting into the network. FirstNet can use it authorities in the leasing of the spectrum to prevent states from using funds and sweeping money into their general funds. FirstNet does not approve alternative plan, it is done by the FCC – this is the hammer that FirstNet has the spectrum lease agreement.

We also preliminarily conclude here that, for the reasons discussed above related to CLAs, FirstNet, in the exercise of its duties, can and must take into account, among other things, the considerations discussed above regarding the effects on other States of a State's plan to retain all subscriber fees in determining whether and under what terms to enter into a spectrum capacity lease with a State.

- As long as re-investment restrictions don't affect the intent of the act for systems to be self-sustaining and the long term care and feeding of the network aren't affected, including if extra funds are available, the subsidization of State Public Safety user fees, then fine. If states put money in the general fund, anything can happen to them.
- Also goes to the issues brought up about towns on a border with other states; in general FirstNet should consider the network as a whole rather than pieces (states).

Consistent with our proposed approach to efficiently leverage CLA fees from third parties, FirstNet would explore "win-win" solutions with States desiring to assume RAN and customer-facing obligations

if subscriber fees with or without CLA fees would materially exceed RAN and related costs in a State. We seek comments on these preliminary conclusions.

We turn now to the interpretation of certain aspects of provisions addressing the reinvestment of CLA fees assuming that a State has received approval from NTIA and entered into a spectrum capacity lease with FirstNet. We note the parallels between FirstNet and the State's provisions addressing the reinvestment of fees. Subsection 6208(d) requires FirstNet to reinvest those amounts received from the assessment of fees under Section 6208 in the NPSBN by using such funds only for constructing, maintaining, operating, or improving the network. [110] Such fees under Section 6208 include basic network user fees and fees related to any CLAs between FirstNet and a secondary user. [111]

Parallel to FirstNet's provision in Section 6208(d), Section 6302(g)(2) requires that any amounts gained from a CLA between a State conducting its own deployment of a RAN and a secondary user must be used only for constructing, maintaining, operating, or improving the RAN of the State. [112] However, the exact parallels between the reinvestment prohibitions in the Act applicable to FirstNet, and those applicable to such States, end there.

Section 6208(a)(2) authorizes FirstNet to charge lease fees related to CLAs. Other than CLAs, however, FirstNet is not expressly authorized to enter into other arrangements involving the sale or lease of network capacity. In potential contrast, Section 6302(g)(1) precludes States from providing "commercial service to consumers or offer[ing] wholesale leasing capacity of the network within the State *except directly through public-private partnerships for construction, maintenance, operation, and improvement of the network within the State."* Section 6302(g)(2), entitled "Rule of construction," provides that "[n]othing in this subsection shall be construed to prohibit the State and a secondary user from entering into a covered leasing agreement." [113]

These two components of subsection 6302(g) raise questions as to whether (1) there is any type of PPP that is not a CLA, and if so, (2) whether such a PPP would permit commercial use of such capacity more flexibly or less flexibly than a CLA given the difference in their respective requirements. That is, do these provisions of the Act provide States that assume RAN responsibility more or less flexibility in wholesaling capacity than FirstNet? Moreover, if such a non-CLA PPP exists, under the second sentence of Section 6302(g)(2), amounts generated by such an arrangement, unlike those from a CLA, could under the literal terms of Section 6302(g)(2) potentially not be subject to reinvestment in the network as that provision states that it is revenues gained "from such a leasing agreement" (ostensibly referring to "covered leasing agreement" in the immediately preceding sentence) that must be reinvested. [114]

These potential differences between the Act's treatment of FirstNet and States with regard to capacity leases turn on whether Congress intended a difference between the definition of CLA, explored in the *First Notice,* and a "public-private partnership for construction, maintenance, operation, and improvement of the network." There are several differences in statutory language between the two:

(1) CLAs must be a written agreement, whereas PPPs are not expressly required to be in writing;

(2) CLAs are "arrangements", whereas PPPs are "partnerships";

(3) PPPs must include "improvement" of the network in addition to the "construction" and "operation" of the network required by both CLAs and PPPs;

(4) CLAs must include the "manage[ment]" of the network whereas PPPs must include the "maintenance" of the network; and

(5) PPPs need not expressly permit (i) access to network capacity on a secondary basis for non-public safety services and (ii) the spectrum allocated to such entity to be used for commercial transmissions along the dark fiber of the long-haul network of such entity.

We believe, however, that in practical terms the differences in items (1)-(4) above are slight. For example, any significant agreement of this type is likely to be in writing, and most such agreements could include improvement, management, or maintenance of the network in some manner to qualify.

With regard to item (5) above, interpreted consistent with our preliminary conclusions in the *First Notice,* these "permit[ted]" uses could provide express flexibility to a CLA party but not a PPP. Nevertheless, Section 6302(g)(2) permits States to enter into CLAs, indicating an intent to include CLAs within the scope of PPPs. [115] We thus preliminarily conclude that, in practical effect, the literal statutory differences result in little difference between the Act's treatment of FirstNet and States that assume RAN responsibility. We seek comments on this preliminary conclusion.

- Agree - this could benefit commercial providers that enter into a PPP or CLA - i.e. extending coverage and capacity, leveraging infrastructure, etc.

Given this preliminary conclusion, we do not believe Congress intended to permit such States to avoid reinvestment in the network through use of subtle differences in network capacity arrangements. Nothing in the Act indicates that such subtle differences should justify driving scarce resources away from the network and thus, effectively, public safety entities. Nor does anything in the Act indicate that Congress intended the network to be even a partial revenue generator for States. Given the provisions of and overall framework and policy goals of the Act, we preliminarily conclude that Congress intended that any revenues from PPPs, to the extent such arrangements are permitted and different than CLAs, should be reinvested into the network and that the reinvestment provision of Section 6302(g) should be read to require as such. [116] We seek comments on this preliminary conclusion.

- If a state has developed a 5-7 year plan funds should be able to be invested over time to get through lean and flush times.
- Agreed – fees need to go back into the network.

Notwithstanding our preliminary legal conclusions above, however, fees—either basic user fees or those from PPPs—used for purposes other than constructing, maintaining, operating, or improving the RAN in a State could potentially severely impact the ability of a State to maintain ongoing interoperability and/or maintain comparable security, coverage, and quality of service to that of the NPSBN over time. Accordingly, we believe the potential loss to the network of either of these revenue streams, and thus State commitments to reinvest such revenue streams if the final interpretation of Section 6302(g) permits such losses, could be considered by NTIA in assessing any State alternate plans and related demonstrations by a State, and could be the subject of negotiated terms in any spectrum capacity lease between FirstNet and such a State in accordance with our preliminary conclusions regarding such leases above.